INDEX

CITATIONS.

Cases:

Cases—Continued

Statute:

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 292

CHARLES EDWARD SANDERS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (R. 25–28) is reported at 297 F. 2d 735. The opinions of the district court in this proceeding (R. 22–23) and on petitioner's first motion to vacate sentence (R. 15–17) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on December 14, 1961 (R. 28–29). The petition for a writ of certiorari was filed on February 5, 1962 and was granted on June 25, 1962 (R. 29; 370 U.S. 936). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Petitioner's first motion under 28 U.S.C. 2255, which alleged that his plea of guilty had been entered involuntarily, without assistance of counsel and without knowledge of the charge, due to intimidation and coercion, had been denied by the district court on the basis of the files and records, which included a transcript of the arraignment. In his second motion, petitioner alleged that his plea was made without understanding in that drugs had been administered to him in jail to treat his narcotic addiction. Petitioner made no attempt to explain his failure to present this contention in his former motion.

The question presented is whether, in light of the files and records before the district court and the absence of explanation for petitioner's failure to raise the point earlier, his second motion could properly be denied as a successive motion for similar relief.

STATUTE INVOLVED

Section 2255 of Title 28, United States Code, provides:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collater l attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced

him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

STATEMENT

THE ARRAIGNMENT

On Friday, January 16, 1959, at a hearing before a United States Commissioner on a charge that he had robbed a San Francisco bank earlier that day, petitioner stated that he wished to waive indictment. On Monday, January 19, 1959, he appeared before the United States District Court for the Northern District of California without an attorney. The Assistant United States Attorney informed the court that petitioner had told the United States Commissioner that he desired to waive indictment. A copy of the proposed information was then given to petitioner (R. 1). It charged that on January 16, 1959, petitioner robbed Frances C. Cullen of $220 belonging to the Crocker-Angelo National Bank, Sacramento California, a federally insured bank (R. 6–7). The judge explained the charge to petitioner and informed him that he had a right to have an attorney at all stages of the proceedings to advise and represent him and that, if he desired an attorney, the court would obtain one for him (R. 1–2). The court further explained that petitioner could proceed without an attorney if he desired, provided he understood his right to counsel and expressly waived it. The court then asked petitioner to express his desires as to the services of an attorney. Petitioner stated that he did not want an

attorney. In response to further questions, he acknowledged that he understood his right to an attorney and that he was waiving that right (R. 2). The court also explained the right to grand jury indictment, advising petitioner that if he thought himself innocent he should have the matter heard by the grand jury to determine whether he should even be required to stand trial (R. 2). The court then asked the following questions (R. 3):

> Having in mind all that I have told you do you wish to have the matter heard by the grand jury?
>
> The DEFENDANT. No, your Honor, I waive it.
>
> The COURT. I didn't hear that.
>
> The DEFENDANT. I waive that right.
>
> The COURT. You waive that right?
>
> The DEFENDANT. Yes.
>
> The COURT. You understand you do have the right, though?
>
> The DEFENDANT. Yes.
>
> The COURT. And you now want to proceed without indictment and by way of information?
>
> The DEFENDANT. Yes.

In response to further questions by the court, petitioner said that he freely and voluntarily, of his own free will and wish, preferred to proceed in this fashion, and that no threats or promises had been made to induce him to take such action (R. 3). Petitioner then signed a waiver of indictment (R. 3, 5). After the clerk read the information, petitioner stated that he understood the charge and was ready to enter his plea (R. 3–4). When asked if his plea was guilty or not guilty, petitioner responded guilty. The court re-

ferred the matter to the probation officer for his consideration and report (R. 4). The case was then continued (R. 5).

About three weeks later, on February 10, 1959, after two additional continuances, petitioner was again brought before the court (R. 5, 7). After recapitulating the occurrences at arraignment, the court advised petitioner that the purpose of the proceeding was to consider probation and to pronounce judgment. The probation officer advised the court that he had nothing to add to his report. The court asked petitioner if he wished to make a statement before judgment was pronounced (R. 7). The following then ensued (R. 8):

> Mr. SANDERS. If possible, your Honor, I would like to go to Springfield or Lexington for addiction cure. I have been using narcotics off and on for quite a while.
>
> The COURT. Well, I am willing to recommend that. Of course, it is up to the Attorney General what is done in that regard. But I suggest that it be noted that this man has indicated that he has had difficulty with narcotics and he desires to be treated, and I think that it is not only humane but proper and just under the circumstances.

The court then sentenced petitioner to fifteen years imprisonment, recommending commitment to a medical facility for treatment (R. 8–9).[1]

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[1] Petitioner was sent to the United States Penitentiary at McNeil Island, Washington. In October 1959, petitioner requested a transfer to the Penitentiary at Alcatraz, California. The request was granted and he was transferred to Alcatraz on January 12, 1960.

THE FIRST MOTION TO VACATE SENTENCE

Almost a year later, on January 4, 1960, petitioner filed a motion to vacate sentence under 28 U.S.C. 2255 from McNeil Island Penitentiary in which (1) he challenged the validity of the "indictment", (2) claimed denial of adequate assistance of counsel, and (3) contended that the court had allowed him "to be intimidated and coerced into entering a plea without Counsel, and any knowledge of the charges lodged against" him (R. 10-11). He also argued that there had been no adequate investigation of the facts (R. 12). In connection with this motion, petitioner filed a petition for a writ of habeas corpus *ad testificandum* (R. 13–14). On February 3, 1960, the trial judge, in a memorandum, denied the motion and petition without a hearing. The court, while noting that the motion was subject to denial because of its conclusory allegations, detailed what the files and records revealed concerning the voluntariness of petitioner's action. It specificially held that his unsupported charges were conclusively and completely refuted by the files and records of the case (R. 15–17). Petitioner did not appeal.

THE SECOND MOTION TO VACATE SENTENCE

The instant proceeding was initiated by a motion to vacate sentence filed on September 8, 1960, from Alcatraz Penitentiary.[6] This motion alleged that "at the time of trial and sentence the petitioner was mentally incompetent and was unable to cooperate intelligently in his defense; that his mental incompetency was the result of administration of narcotic drug during the

period petitioner was held in the Sacramento County Jail pending trial in the instant case" (R. 17). In a supporting affidavit, petitioner asserted that, while confined in the Sacramento County Jail from about January 17, 1959, until February 18, 1959, he was intermittently under the influence of a drug given to him by the jail medical authorities because he was a known drug addict; that during "the period of the trial" he did not understand the proceedings owing to mental incompetency caused by the administration of drugs (R. 21). A memorandum filed in support of the motion contended that the allegation that petitioner was mentally incompetent at the time of trial presented a factual issue requiring a hearing at which petitioner could "have his day in court on this issue" (R. 18–20).[2]

On September 15, 1960, the sentencing court denied petitioner's motion without a hearing. In its opinion, the district court recalled that he had recommended, at petitioner's request, that he be sent to a medical facility for treatment for narcotic addiction; that petitioner's first motion did not mention any mental incompetency caused by narcotic drugs although such facts, if true, must have been known at that time; that petitioner offered no excuse for failing to raise the question on his first motion; and that the court had carefully considered and denied that motion on its

[2] Except for the dates, the place of confinement and the purpose of the medical treatment, petitioner's motion, affidavit and memorandum are identical to those filed earlier by another prisoner at Alcatraz. See record in *Baker* v. *United States*, No. 494 Misc., this Term.

merits. The court observed that the statute did not require it to entertain a second motion for similar relief, and that no reason was given or apparent as to why petitioner did not raise the issue of mental incompetency on the first occasion. It therefore refused in its discretion to entertain the motion. In a footnote, the court gave as an alternative ground for decision that it "has reviewed the entire file in Criminal No. 12310, which includes the previous proceeding, and a transcript of the proceedings at the time petitioner entered his plea, and, aside from the conclusion reached on the legal propriety of the instant petition, it is of the view that petitioner's complaints are without merit in fact" (R. 23).

The court of appeals affirmed the order of the district court, holding (R. 28):

> Where, as here, it is apparent from the record that at the time of filing the first motion the movant knew the facts on which the second motion is based, yet in the second motion set forth no reason why he was previously unable to assert the new ground and did not allege that he had previously been unaware of the significance of the relevant facts, the district court, may, in its discretion, decline to entertain the second motion. * * *.

SUMMARY OF ARGUMENT

I

The failure to utilize an earlier opportunity to rectify errors in a criminal judgment significantly increases the likelihood that there is no real basis for a later claim that a judgment was not fairly entered.

For example, if a prisoner has once unsuccessfully attacked a guilty plea collaterally on the ground of physical coercion, a later motion made on the basis of previously unmentioned threats or promises must be viewed with considerable suspicion. Because of this evidentiary consideration and in order to deter abuses of the writ of habeas corpus, this Court held, prior to the enactment of Section 2255 in 1948, that a court, in ruling on a successive application for habeas corpus, might give substantial weight to the lack of an adequate explanation for the prisoner's failure to raise the point in an earlier application.

For similar reasons Title 28, U.S. Code, Section 2255 grants the district courts power to deny successive motions on the basis of the entire record before the court, including the record of denial of an earlier motion for similar relief under the same statute. This statutory grant of discretion in dealing with successive motions, like the power to deny a hearing when the files and records show that the prisoner is entitled to no relief, is justified by three major considerations: the importance of protecting the efficacy of the collateral remedy from dilution by large numbers of frivolous motions; the costs and difficulties of transporting prisoners to and from the sentencing court; and the burden on sentencing courts of affording an evidentiary hearing to every untried factual claim, no matter how palpably untrue or how completely the prisoner's rights have been protected at trial or on prior motions.

The legislative history of 28 U.S.C. 2255 and of a companion habeas corpus provision, 28 U.S.C. 2244, both enacted in 1948, shows plainly that Congress did not intend to grant prisoners an absolute right to hear

ings on successive motions in cases involving neither newly discovered facts nor a change of law. Instead of imposing a fixed time limitation upon applications for collateral relief—a course which might have produced harsh consequences in some cases—Congress relied upon the sentencing court to exercise an informed discretion in determining whether to entertain a second or successive motion to vacate sentence.

II

In this case, the sentencing court properly denied petitioner's second motion for collateral relief in light of the record and files before it, including, not least of all, petitioner's failure to raise, in his earlier motion under Section 2255, his present claim that his plea of guilty was vitiated by incompetency. The record of the trial, which took place before the same district judge who passed upon both Section 2255 motions, shows that the trial judge took exceptional care to assure himself that petitioner was pleading guilty voluntarily, with full knowledge of the charge and of all of his procedural rights. The record, moreover, indicates affirmatively that petitioner was aware and alert at this proceeding.

Petitioner's first motion, which claimed that he had been coerced into pleading guilty, was denied on the merits by the sentencing judge a year after conviction. On the basis of the records and files before it, the court found that petitioner had "freely and voluntarily of [his] own will and wish" waived indictment and counsel and entered a guilty plea.

Petitioner's second motion under Section 2255, although also contending that his guilty plea was not

voluntary, asserted different and inconsistent grounds. While the first motion presupposed an awareness of the proceedings and charged that illegal pressure was deliberately used to obtain a guilty plea, the second motion asserted an unawareness of the proceedings but did not claim coercion.

Thus, in denying petitioner's motion, the sentencing court had before it (1) a record showing exceptional care by the trial judge in receiving the plea of guilty; (2) a former motion showing an awareness by petitioner that there was a remedy for a plea of guilty involuntarily entered and an earlier attempt to invoke that remedy without even a mention of incompetence caused by the use of drugs; and (3) evidence that the earlier motion had been denied on the ground that its allegations were affirmatively contradicted by the record. In light of these circumstances, the petitioner's allegations were too highly implausible to justify renewed litigation over the voluntariness of a plea already twice found voluntary, and the sentencing court was well within its discretion in declining "to entertain a second * * * motion for similar relief on behalf of the same prisoner."

ARGUMENT

I

SECTION 2255 GRANTS THE DISTRICT COURT DISCRETION TO DENY SUCCESSIVE MOTIONS ON THE BASIS OF THE FILES AND RECORDS IN THE CASE, INCLUDING THE HISTORY OF ANY PRIOR MOTION FOR SIMILAR RELIEF

Section 2255 of Title 28 provides that the district court may refuse to entertain a motion to vacate, set

aside, or correct a prisoner's sentence when the motion itself states no grounds for relief or the files and records show that the prisoner is entitled to no relief. It also provides that the sentencing court "shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner". In the present case, the district court denied petitioner's second motion under Section 2255 both on the ground that the motion was "a second or successive motion for similar relief on behalf of the same prisoner" and because the files and records of the case conclusively show that the prisoner is entitled to no relief. We submit that the district court was correct in its reliance on both grounds. Indeed, in cases such as this the facts of record and the history of prior collateral attacks upon the conviction should be considered in relationship to each other, for both involve similar statutory policies. Before considering the particulars of this case, we undertake to examine these policies.

A. SIGNIFICANT POLICY CONSIDERATIONS DICTATE THAT THE SENTENCING COURTS HAVE POWER TO DENY A PLAINLY INSUBSTANTIAL CLAIM ASSERTED ON COLLATERAL ATTACK OF A CONVICTION

There is a very high probability that even an uninformed prisoner will, in his first collateral attack on his conviction, raise all substantial factual arguments for believing that his conviction was unfairly obtained. And once a prisoner has attacked his conviction upon the ground of governmental overreaching, alleging one set of facts, any repetition of substantially the same claim upon a new set of factual allegations, which must have been known to the pris-

oner during the first proceeding, is necessarily suspect. It is this evidentiary relevance of an earlier failure to raise factual attacks on a conviction which, in large part, explains both this Court's pre-1948 decisions giving weight to an earlier failure to raise a ground for relief and the provision of Section 2255, enacted in 1948, empowering the district court to refuse in appropriate circumstances to entertain "a second or successive motion for similar relief."

Thus this provision of Section 2255 is closely related in purpose to the clause empowering the district courts to decline to entertain any motion where "the files and records of the case conclusively show that the prisoner is entitled to no relief." Both provisions reflect a considered determination that an evidentiary hearing should not be required where it is clear from the entire record before the sentencing court that the prisoner's allegations are wholly insubstantial. Congress and this Court both recognized that significant policy considerations outweigh the desirability of granting every prisoner an absolute right to an evidentiary hearing on every newly made factual allegation, no matter how implausible in light of the entire record before the sentencing court.

Three basic considerations have dictated that the district courts must have power to deny an evidentiary hearing on collateral attack where, as we shall later show in this case, it is plain that the prisoner's allegations are frivolous in light of the record. Of primary importance is the fact that if, time after time, a prisoner is to be brought before the courts for hearings on issues of fact which turn out to be without merit, the final result cannot fail to be that judges

will tend to view motions by all prisoners with a degree of skepticism that will in the end redound to the detriment of the persons for whom the remedy under 28 U.S.C. 2255 was designed. As Mr. Justice Jackson said in *Brown* v. *Allen*, 344 U.S. 443, 537 (concurring opinion): "It must prejudice the occasional meritorious application to be buried in a flood of worthless ones. He who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search."

Secondly, it is costly and burdensome to take a prisoner from a federal penitentiary to the sentencing court for an evidentiary hearing on a patently insubstantial factual allegation. There are at present over 8,000 prisoners serving terms of five years or more. Hundreds of these prisoners file Section 2255 motions each year.[3] By far the greater part of these are wholly without merit and many are plainly grounded upon fabrication. Claims similar to petitioner's provide a ready example. This Term, this Court itself has had before it five cases, four from Alcatraz and one from Leavenworth, where petitioners, confined before conviction in different jails, have made allegations similar to those made by petitioner, *i.e.*, that they were mentally incompetent because of drugs administered to them before or during the proceedings leading to

[3] According to the reports of the Administrative Office of the United States Courts, 538 proceedings under 28 U.S.C. 2255 were commenced in 1960 and 560 in 1961. Annual Report of the Director, 1960, p. 231; *id.*, 1961, p. 239. Even these figures do not, however, appear to be complete in light of the Department's experience with petitions for writs of certiorari in this Court.

their conviction.[4] Numerous similar cases involving prisoners in Alcatraz and other penitentiaries have been before the courts of appeals.[5] Repeatedly transporting prisoners back and forth for post-conviction hearings before the sentencing court can become a serious problem in prison administration.

Finally, there is the burden upon the district courts of hearing insubstantial and repetitive claims—a burden which must be considered in light of the full protections which (as the record may reveal to the sentencing court) were granted the prisoner at trial. For example, in the case of a guilty plea, Rule 11, F.R. Crim. P., imposes on federal courts, before the plea is accepted, the duty of making certain that it is voluntarily entered with understanding of the nature of the charge. Even where, as in some cases, the record of arraignment does not show as full an inquiry by the trial court as took place in this case and as might seem desirable to an appellate court, this does not necessarily reflect a failure of the judge to discharge that duty. There may often be unspoken

[4] See *Boyes* v. *United States*, No. 59 Misc.; *Malone* v. *United States*, No. 55 Misc., certiorari denied, 371 U.S. 863; *Burrow* v. *United States*, No. 277 Misc.; *Sprenz* v. *United States*, No. 279 Misc.; and *Baker* v. *United States*, No. 494 Misc.

[5] *Catalano* v. *United States*, 298 F. 2d 616 (C.A. 2); *Pledger* v. *United States*, 272 F. 2d 69, 301 F. 2d 906 (C.A. 4); *United States* v. *McNicholas*, 192 F. Supp. 717 (D. Md.), affirmed, 298 F. 2d 914 (C.A. 4), certiorari denied, 369 U.S. 878; *Alexander* v. *United States*, 290 F. 2d 252 (C.A. 5); *Riffle* v. *United States*, 299 F. 2d 802 (C.A. 5); *Juelich* v. *United States*, 300 F. 2d 381 (C.A. 5); *Scott* v. *United States*, 292 F. 2d 49 (C.A. 6), certiorari denied, 368 U.S. 879; *Hayes* v. *United States*, 305 F. 2d 540 (C.A. 8); *Johnston* v. *United States*, 292 F. 2d 51 (C.A. 10), certiorari denied, 368 U.S. 906. See also *O'Brien* v. *United States*, No. 20280, E.D. Pa.

assumptions in the case which are not reflected in the record. For example, the sentencing court may be well aware that the particular attorney who represented the defendant is the kind of defense counsel who would not have permitted a client to plead guilty unless he was convinced that no defense was possible. Although this fact would not be reflected in the record, the court would naturally require a greater showing before believing that a plea of guilty in such a case might have been uninformed or involuntary. Moreover, increasingly in the federal courts, particularly in cases involving guilty pleas, judges are availing themselves of pre-sentence reports before fixing sentences. Investigations by trained probation officers tend to uncover latent problems, such as incompetency, which might have escaped the attention of the judge, prosecutor, or defense counsel when the plea was accepted.

These three considerations—the need to give painstaking consideration to motions which appear meritorious, the administrative burdens involved in transporting large numbers of prisoners each year, and the threatened drain upon the time and energy of district judges—require a procedure by which district courts can deny hearings to motions which are so implausible in light of the record before the trial court and the prisoner's record of prior motions as to indicate that denial will leave no significant likelihood of injustice. It is no answer to frivolous applications to say that prisoners filing false affidavits could be prosecuted criminally. Prosecutions for false swearing or perjury are notoriously difficult. Moreover, a prisoner with a grievance should have a right to complain without fear of

additional punishment. The short of it is that control of the volume of hearings on insubstantial factual allegations under 28 U.S.C. 2255 necessarily depends upon the sentencing court's effective exercise of the power to deny a hearing when, in the language of the statute, "the files and records of the case conclusively show that the prisoner is entitled to no relief" or the motion is "a second or successive motion for similar relief on behalf of the same prisoner.".

We do not suggest that these three considerations alone, without consideration of the substantiality of the prisoner's claim, could justify denial of a motion under Section 2255. But they do justify granting the district courts power to consider whether such a motion is in fact frivolous in light of the record and previous motions before granting an evidentiary hearing. The fact that a prisoner has previously filed other motions under Section 2255 without the barest mention of the grounds for release relied upon in a later motion has obvious relevance to the substantiality of his allegations. For example, if a prisoner has once unsuccessfully attacked a guilty plea on the ground of physical coercion, a later motion made on the basis of previously unmentioned threats or promises must be viewed with considerable suspicion. Because of this and in order to deter abuses of the writ of habeas corpus, this Court held, prior to the enactment of Section 2255 in 1948, that, though the doctrine of *res judicata* was inapplicable to habeas corpus, a court in ruling on a second application for identical relief could give controlling weight to a prior denial of habeas corpus (*Salinger* v. *Loisel*, 265 U.S. 224) and, in certain circumstances, must give the prior

denial such weight although the precise issue raised in the second application had not been previously determined (*Wong Doo* v. *United States*, 265 U.S. 239). While in *Waley* v. *Johnston*, 316 U.S. 101, the Court held that an application should not be denied as successive where the first was denied for insufficiency on its face, the permissibility of denying a successive application for habeas corpus where there was no excuse for failure to raise the point in an earlier application was reaffirmed in *Price* v. *Johnston*, 334 U.S. 266.

B. THE LEGISLATIVE HISTORY OF SECTION 2255 ESTABLISHES THAT SENTENCING COURTS WERE GRANTED DISCRETION IN DECIDING WHETHER TO ENTERTAIN A SUCCESSIVE MOTION TO VACATE SENTENCE

It was against this background that Congress enacted Section 2255 in 1948. As passed, Section 2255 broadly provides that "The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner." Its history confirms what the language indicates: That Congress proposed to confer upon the district courts broad discretion to entertain only those successive applications which are justified by either a convincing suggestion of truth or an explanation of the failure to raise the ground for relief in an earlier application.

Section 2255 came into being in 1948 in the revised Judicial Code as a part of the new habeas corpus chapter (chapter 153) enacted upon the recommendation of the Judicial Conference of the United States. At the same time, Section 2244, a related provision for habeas corpus, was adopted. The committee appointed by the Judicial Conference to study habeas corpus procedure prepared a draft of two bills, a

"procedural bill" for habeas corpus applications from which Section 2244 was derived and a "jurisdictional bill" from which Section 2255 was derived.

1. Section 1 of the procedural bill provided as follows (H.R. 4232 and S. 1452, 79th Cong., 1st Sess.):

> That no circuit or district judge shall entertain any application for a writ of habeas corpus to inquire into the detention of any person pursuant to a judgment of any court of the United States or of any State, if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus and the petition presents no new ground not theretofore presented and determined. A new ground within the meaning of this section includes a subsequent decision of an appellate court or the enactment or repeal of a statute. The judge who determines an application for writ of habeas corpus may, however, grant a rehearing at any time, and, if the judge dies, goes out of office, or becomes disabled, a rehearing may be granted by his successor, or by the judge designated to hear the matter in the event of his disability. * * *

That the bill was intended to deny any claim to have successive applications entertained as a matter of right except where there were grounds for relief which not only had not been "theretofore presented," but which were also "new" because they had been unavailable at the time of the earlier application, is clear from a memorandum explaining the bill to the House and Senate Judiciary Committees. This memorandum,

written by Circuit Judge Stone and approved by Chief Justice Stone, explained Section 1 of the procedural bill as follows (emphasis added):

> Section 1. This section is intended to accomplish four things: (1) to prevent "shopping around" from court to court and from judge to judge, or repeated petitions (on the same grounds) to the same court or judge; (2) *to compel petitioner to state in his petition all of the grounds for the writ then known to him;* (3) *to afford unlimited opportunity to present any grounds which petitioner may thereafter discover at any time;* (4) to afford unlimited opportunity to apply for rehearing even upon petitions theretofore presented.
>
> As to the first purpose, the necessity therefor has been sufficiently outlined hereinbefore. * * *
>
> *The second purpose is self-explanatory and would seem to require no elaboration.* Also see *Wong Doo* v. *United States*, 265 U.S. 239, 241 (1924).
>
> *The third purpose is brought about by allowing presentation of a subsequent petition based upon "new" grounds "not theretofore presented and determined."*
>
> The fourth purpose is accomplished by allowing a "rehearing", without time limit, for presentation not only of any fact situation discovered after the first trial or any subsequent applicable change in law (statutory or decision) which might have affected the first determination; but also any grounds presented by the first petition.
>
> Thus, the fullest rights of the prisoner are

preserved and, at the same time, repetitious petitions and hearings are lessened."

The September 1947 session of the Conference suggested changes in Section 2244 which Congress adopted. The provision as finally enacted retained the earlier term, "new ground not theretofore presented and determined," and provided:

> No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States, or of any State, if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus and the petitions present no new ground not theretofore presented and determined and the judge or court is satisfied that the ends of justice will not be served by such inquiry.

S. Rep. 1559, 80th Cong., 2d Sess., p. 9, explained the change as follows:

> The amendment to section 2244 is proposed by the Judicial Conference of Senior Circuit Judges. The original language of the section denies to Federal judges the power to entertain an application for a writ of habeas corpus where the legality of the detention has been determined on a prior application for such a writ,

[6] S. 1452 was reintroduced in the 80th Congress, 2d Sess., as S. 21. On June 7, two days before he submitted the report on the revision of Title 28, Senator Wiley of the Judiciary Committee submitted a report on S. 21 which adopted the memorandum of Circuit Judge Stone. S. Rep. 1527, 80th Cong., 2d Sess.

> and the later application presents no new grounds. The amendment proposed to modify this provision so that, while a judge need not entertain such a later application for the writ under such circumstances, he is not prohibited from doing so if in his discretion he thinks the ends of justice require its consideration. * * *[7]

It is, accordingly, plain that Section 2244, like the original draft, granted the district courts broad discretion to refuse to entertain a successive application unless it states a "new ground" which the prisoner discovered after filing his former application.

2. The legislative history of Section 2255, although less complete than that of its companion habeas corpus provision, reflects a similar concern that the district courts not be compelled to grant successive hearings except in the event of discovery of new facts or a change of law. The original draft of the jurisdictional bill which became Section 2255 (H.R. 4233 and S. 1451, 79th Cong., 1st Sess.) contained no provision concerning successive motions, but a substitute draft (H.R. 6723, 79th Cong., 2d Sess.) provided that the action should be brought within a year after discovery of the facts relied upon or after a change of law:

> Any motion under this section shall be filed within one year (a) after the effective date of this Act, or (b) after the discovery by movant

[7] No comment was made on the fact that the initial suggestion for unlimited rehearing before the judge who originally heard the writ was dropped. It seems evident, however, that this provision was no longer deemed necessary since the same result was accomplished by providing that a district court could, although it need not, consider a later application even though no new ground was raised.

> of facts upon which he relies for relief, or (c) after any change of law, by statute or controlling decision, occurring subsequent to imposition of sentence and upon which he relies for relief. The burden of establishing that the motion was timely filed shall be upon movant; and failure to file such motion within such time shall bar relief by the writ of habeas corpus unless it appears that it would not have been practicable to determine petitioner's rights to discharge from custody on such motion if the motion had been filed in time.

In April 1947, the Habeas Corpus Committee of the Judicial Conference submitted a further report in which it expressed disapproval of H.R. 6723 solely on the ground that there should be no time limitation upon the release of a person wrongfully deprived of his liberty. The bill in its ultimate form (framed by the House Revisers and approved by the Judicial Conference) dropped the time limitation but contained the present provision that a court was not required to entertain a successive motion for similar relief. No further explanation of this provision appears in the available materials.

Thus, as to Section 2255 Congress rejected an inflexible time limit in favor of an approach which empowered the trial court to decide in its discretion whether a repetitive application should be entertained. The effect of the legislation is also to overrule that part of the decision in *Price* v. *Johnston*, *supra*, p. 19,[8] which required the government to raise

[8] *Price* v. *Johnston* was argued on December 16, 1947, and was decided on May 24, 1948. Thus the decision did not in-

the issue of abuse of the writ of habeas corpus if the district court were to rely on this ground for denying a hearing. The statute as enacted expressly provides that "*The sentencing court* shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner" (emphasis added).[9]

C. IN DETERMINING WHETHER TO ENTERTAIN A SUCCESSIVE MOTION UNDER SECTION 2255, A SENTENCING COURT MAY PROPERLY CONSIDER THE PRISONER'S FAILURE TO RAISE THE POINT PREVIOUSLY

Both this Court's pre-1948 decisions and the wording and legislative history of Section 2255 thus show that a prisoner's failure, in an earlier application, to raise grounds of attack on his conviction may provide the basis for denial of a hearing on a successive motion, unless the later motion either makes a convincing statement of merit or adequately explains the earlier failure to raise the point. In large part, such a limitation upon successive applications involves a common-sense recognition that the failure to utilize an earlier opportunity to rectify errors in a criminal judgment increases the likelihood that there is no real basis for the belated claim. If a prisoner has had and exercised an opportunity to test the procedures leading to his conviction, justice does not require that he also be entitled to an evidentiary hearing whenever he asserts as-yet-untried factual claim.

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volve Section 2255; nor was it of any effect in the consideration of that legislation. See *Darr* v. *Burford*, 339 U.S. 200, 212, n. 34, which discussed the similar position of *Wade* v. *Mayo*, 334 U.S. 672, with respect to the enactment of 28 U.S.C. 2254.

[9] This statutory change in the prior case law may well be explained by the fact that under Section 2255, unlike the situation with regard to habeas corpus, the prisoner's claim is to be

The issue of the voluntariness of guilty pleas which is involved in this case presents an excellent example. Once a prisoner knows that, if he has in some manner been unfairly induced to enter a plea of guilty, he has a ground for redress in the courts, the basis for his feeling that his rights were violated, if it has any justification in reality, will normally emerge in the first motion, however inartistically formulated. Particularly where, as here, the prisoner is aware of the specific basis of the remedy—*i.e.*, that an involuntary plea can be set aside—it is reasonable to expect that, if a prisoner really believes that he has been overreached, the facts which give rise to that feeling will be stated. Different and successive factual allegations to support a claim of involuntariness are rightly considered suspect.

Of course, the reason for the rule also limits its application. If a prior application was denied for reasons which were essentially procedural (such as a failure to detail adequately the grounds asserted), there would be no basis for treating a corrected application as successive. See *Waley* v. *Johnston, supra*, p. 19. It is only where a prisoner has had and exercised a meaningful opportunity to challenge the fairness of his conviction that he must proceed under an addi-

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presented to the sentencing court which, in considering the successive motion, has immediately available the record of the original conviction and of the first motion. The sentencing court can thus often decide for itself, without waiting for the government's response, whether the new motion is so clearly related to the first that no further proceedings are necessary. The statute does not even require that notice be given to the United States Attorney where the motion and files and records conclusively show that the prisoner is entitled to no relief.

tional statutory burden in filing a successive motion. All of the surrounding circumstances may, of course, be considered. A lack of educational background and prior criminal experience may be considered on behalf of the prisoner. On the other hand, if the prisoner is engaged in a pastime of filing periodic motions (see *e.g.*, *Lipscomb* v. *United States*, 308 F. 2d 420 (C.A. 8), certiorari denied, 371 U.S. 928), the court may spend less time considering his repetitive motions. If the prisoner in earlier motions to vacate his sentence has made factual allegations that have been determined to be unfounded, that may properly be weighed against him. So, too, if he is continually shifting from one ground for relief to another.

Congress laid down no absolute rule for determining the effect to be given a successive motion, and the full range of variant situations cannot be considered here. To be sure, a district court cannot escape the duty of considering a motion under Section 2255 merely because the prisoner failed to raise his claim earlier. But Section 2255 and its background do establish that a failure to make a claim later relied upon justifies the sentencing court in viewing a successive motion with suspicion and in imposing upon the prisoner an increased burden: that of explaining the earlier failure or presenting a ground for relief which has earmarks of reliability.

II

THE DISTRICT COURT PROPERLY EXERCISED ITS STATUTORY DISCRETION IN THIS CASE

In support of his second motion to vacate his sentence under 28 U.S.C. 2255, petitioner alleged that he

"did not understand the trial proceeding" at which he pleaded guilty "owing to his mental incompetency", caused by the administration of drugs by medical authorities at Sacramento County Jail (R. 21). The sentencing judge, who had denied on the merits petitioner's first motion, based in part on an allegation that his plea of guilty was coerced, denied this second motion on the twofold ground that "there is no reason given, or apparent to this Court, why petitioner could not, and should not, have raised the issue of mental incompetency at the time of his first motion" and that a review of the record indicated that "petitioner's complaints are without merit in fact" (R. 23). We submit that both of these conclusions were correct and that they are properly to be considered together for the statutory bases of both are, as we have shown above, closely related.

The record shows that in January 1959, the trial judge carefully and conscientiously endeavored to discharge the duty imposed upon him by Rule 11, F.R. Crim. P., before accepting the plea of guilty. The record is clear that the judge took pains to make certain that petitioner knew of his right to counsel and was knowingly waiving that right.[10] He went on to explain to petitioner that he had a right to have a grand jury decide whether he should be charged at all and obtained an affirmative statement from peti-

[10] The record does suggest, although it does not make explicit, why counsel was waived. The fact that petitioner was arrested and given a preliminary hearing on the very day that the bank robbery occurred suggests that petitioner was caught in the act. The Department files confirm that fact. They also confirm that petitioner had a prior criminal record.

tioner that he wanted to waive that right. He also inquired whether petitioner was pleading guilty voluntarily, without promises or inducements, and whether petitioner understood the nature of the charge. Only after receiving affirmative answers to all of these questions did the judge accept the plea of guilty. It is apparent from the record that he had opportunity to observe petitioner. It is equally plain that a judge who was as conscientious in performing his duty as the trial judge was here would not have permitted the arraignment to go forward if he had any doubt as to the attention and understanding he was getting from the petitioner. Moreover, the record affirmatively shows that petitioner understood the proceedings. When the judge asked him whether he wished to have the matter heard by a grand jury, petitioner answered, "No, your honor, I waive it." And when the judge did not hear his answer, petitioner repeated, "I waive that right" (R. 3). Thereafter, petitioner in open court signed a document which was witnessed by the deputy marshal (R. 3).

The judge did not sentence petitioner until he had received a pre-sentence report almost three weeks later. That report, which is confidential, is not part of the record before the Court, but was before the judge at the time of sentencing and is part of the record available to the judge in considering the motion under 28 U.S.C. 2255. From the record alone it appears that the pre-sentence report must have discussed petitioner's addiction to narcotics, for the judge accepted without question petitioner's statement that he would like to be sent to a prison where he would be

treated for addiction."[11] And it can be presumed that the pre-sentence report contained both a summary of the nature of the crime and of petitioner's criminal record. Thus, before sentencing petitioner, the court had petitioner's solemn assurances that he was pleading guilty voluntarily, the benefit of its own observation of petitioner at the time the plea was accepted and at the time sentence was imposed, the pre-sentence report, and petitioner's own volunteered statement seeking confinement at a medical facility. The judgment against petitioner was not entered in careless or hasty fashion.

Almost a year later, the sentencing judge considered petitioner's case again on his motion to vacate sentence filed from McNeil Island, in which he claimed that he had been coerced into pleading guilty without counsel and without knowledge of the charges against him. Contrary to petitioner's present contention, this motion was not denied because of a deficiency in form but was denied after full consideration. It is true that the court stated that the motion sets forth no facts to support its conclusions and that this deficiency could be a basis for denial. But the court did not refuse relief on this ground. Rather, it rejected petitioner's assertions of intimidation and coercion and denial of counsel only after it examined the files and records of the case. The trial judge

[11] We have confirmed the fact that the probation officer's report (which is not part of the record in this Court) does refer to the petitioner's history of addiction. We have also ascertained from the report that petitioner received medical treatment for withdrawal symptoms while he was in jail prior to sentencing. The probation officer's report does not indicate the nature of the treatment or the precise time at which it took place.

specifically pointed out that the record showed that the court explained to petitioner his right to counsel and the charge which he faced, that it reflected understanding on the part of petitioner, and that with understanding, in the absence of threats or promises, petitioner "freely and voluntarily of [his] own will and wish" waived indictment and counsel and entered a guilty plea. This was a denial on the merits.

Nine months later, after petitioner had been transferred to Alcatraz, he formulated a new way of attacking the plea of guilty. Petitioner's second motion was not a mere correction of the first motion. While both motions contended that his guilty plea was not voluntary, they asserted different reasons for that claim. The first motion contended that the plea was involuntary because petitioner had been intimidated and coerced into a guilty plea without counsel and without knowledge of the charge against him. The second motion contended that his plea was involuntary because he was rendered mentally incompetent by medication. The first motion presupposed an awareness of the proceedings but charged that illegal pressure was deliberately used to bring about a guilty plea. The second motion asserted an unawareness of the proceedings but did not charge that illegal means were deliberately used to coerce the guilty plea.

It was thus against a full and persuasive background that the sentencing judge denied petitioner a second hearing under 28 U.S.C. 2255. The record here shows (1) a careful attempt by the trial judge to make certain that petitioner was aware of all his rights and that he was knowingly and deliberately

pleading guilty; (2) a probation report before sentencing in which the fact of narcotics addiction was, in all probability, brought to the attention of the district court; (3) an earlier awareness by petitioner that there was a remedy for a plea of guilty involuntarily entered and an earlier attempt to invoke that remedy without even making mention of incompetence because of the use of drugs; and (4) an earlier attempt to invoke that remedy on the basis of allegations that were affirmatively contradicted by the record. Under these circumstances the trial judge, who had carefully reviewed the record at the time of the first motion, could properly conclude that a second motion, unsupported by any explanation of the failure to raise its grounds in an earlier motion, should be denied without hearing. This disposition was not only supported by this Court's decisions prior to 1948 but was expressly authorized by 28 U.S.C. 2255, which provides that "The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner."

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be affirmed.

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